

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 10 October 2006

BALCA Case No.: 2006-PER-00059
ETA Case No.: A-06016-75049

In the Matter of:

SHOGUN AT BEY LEA,
Employer,

on behalf of

VICTOR PEREZ RIVERA,
Alien.

Certifying Officer: Arthur Reyes
Atlanta Processing Center

Appearances: Harry L. Sheinfeld, Esquire
Counsel for Litigation
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Martin Burger, Esquire
Law Offices of Cohn and Berger
Palisades Park, New Jersey
For the Employer

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the "PERM" regulations found at Title 20,

Part 656 of the Code of Federal Regulations.¹ On January 16, 2006, the Employer – a Japanese Steak House/Bar – filed an Application for Permanent Employment Certification on behalf of the Alien for the position of Hibachi Chef. (AF 3, 41-51).² On January 18, 2006, the Certifying Officer (CO) denied certification on several grounds, one of which was that the application Form 9089 indicated that the Employer failed to comply with the regulation at 20 C.F.R. § 656.17(e) – which requires that newspaper advertisements used to support the application must have been placed on two different Sundays – and which requires that the newspaper advertisements were published at least 30 days, but not more than 180 days, prior to the date the application was filed. (AF 38-40).³

By letter dated February 8, 2006, the Employer filed a motion for reconsideration. (AF 3-37). In the letter the Employer argues that it placed advertisements for the job in The Star Ledger on Sunday, June 5, 2005 and Sunday, June 12, 2005. (AF 4). In support, the Employer attached copies of newspaper tear sheets. (AF 21-22). In contrast, the Form 9089 had shown these dates as July 5, 2005 and July 12, 2005. (AF 44-45; Form 9089, I.c.-9 to 12).

The CO denied reconsideration on June 22, 2006, and thereafter forwarded the matter to BALCA. On appeal, the CO filed a brief, but the Employer did not.

We affirm the denial of certification. In *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc), the Board held that the CO should have reconsidered the denial of a PERM application where documentation held by the Employer pursuant to the recordkeeping requirements of PERM conclusively established that the apparent violation

¹ The PERM regulations appear in the 2006 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2006).

² AF is an abbreviation for "Appeal File."

³ The CO also raised an issue about whether the Employer complied with 20 C.F.R. § 656.10(d), which requires certain notifications of the filing of a labor certification application. Because we affirm the denial of certification on other grounds, it is not necessary to rule on whether the CO properly denied certification on this ground.

was an unintentional typographical error on the Form 9089. In *HealthAmerica*, the only issue was whether the Employer was in compliance with the two-Sunday publication rule found at 20 C.F.R. § 656.17(e)(1)(i). A crucial factor in finding that the CO abused his discretion in *HealthAmerica* in refusing to reconsider was that newspaper tear sheets submitted by the Employer with its motion for reconsideration conclusively established that it was in compliance with the two-Sunday publication rule.

In the instant case, however, the Employer's documentation does not establish compliance with the regulations. Rather, it provides documentation supporting the denial of certification.

Specifically, the Employer's motion for reconsideration presented argument and supporting documentation in the form of tear sheets showing that its newspaper advertisements in The Star Ledger were published on Sunday, June 5, 2005 and Sunday, June 12, 2005. Although the motion for reconsideration may have established compliance with the two-Sunday publication issue, it also establishes that the advertisements were published more than 180 days before the application was filed (January 16, 2006).

This application was for a non-professional position, as only a high school level of education was required. (AF 43, Form 9089, H a-1; AF 44, Form 9089, I-a-1). See 20 C.F.R. § 656.3. The regulation at 20 C.F.R. § 656.17(e)(2) provides that "[i]f the application is for a nonprofessional occupation, the employer must at a minimum, place a job order and two newspaper advertisements within 6 months of filing the application. The steps must be conducted at least 30 days but no more than 180 days before the filing of the application." Moreover, the newspaper must be one "of general circulation in the area of intended employment most appropriate to the occupation and the workers likely to apply for the job opportunity." 20 C.F.R. § 656.17(e)(2)(ii).

The newspaper advertisement in The Star Ledger listed by the Employer's in the ETA Form 9089 to support its application violated the 180-day requirement. Accordingly, the CO properly denied certification on this ground.

The Employer's motion for reconsideration also references and provides documentation of a posting of the job in ComputerWorld on July 11, 2005 under classified advertisements for "IT Careers." (AF 24). An advertisement in ComputerWorld was not listed in the ETA Form 9089 to support the application. The regulation at 20 C.F.R. § 656.24(g)(2), provides that a "request for reconsideration may not include evidence not previously submitted." In *HealthAmerica*, the Board held that "for purposes of section 656.24(g)(2), documentation 'submitted' in support of a labor certification application constructively includes the materials held by an employer under the recordkeeping provisions of PERM." Because the ComputerWorld publication was not proffered in the ETA Form 9089 in support of the Employer's recruitment requirements, tear sheets showing such a publication were not documentation held in support of the application. Thus, it is evidence not previously submitted within the meaning of section 656.24(g)(2), and therefore could not be used in support of the motion for reconsideration.

Even if this was evidence that could be used to support a motion for reconsideration, it also violates the 180 day rule at 20 C.F.R. § 656.17(e)(2). Moreover, the ComputerWorld advertisement was not a publication in a newspaper of general circulation in the area of intended employment most appropriate to the occupation and the workers likely to apply for the job opportunity, which must be used to support a PERM application for a non-professional position under 20 C.F.R. § 656.17(e)(2)(ii). Publication of a job for a Hibachi Chef in ComputerWorld under classifieds for IT careers is neither a newspaper advertisement, nor is it even remotely appropriate to the occupation.⁴

⁴ The Employer's motion for reconsideration also contains argument and evidence indicating that ComputerWorld carried job listings for a Hibachi Chef on its web site on Thursday, August 25, 2005. (AF

Based on the foregoing, the Certifying Officer's denial of certification is **AFFIRMED**.

SO ORDERED.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may

4, 35-37). Such a posting, however, is not even arguably in compliance with the two-Sunday newspaper publication rule for a non-professional position found in § 656.17(e)(2).